IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 162 of 1986

For Approval and Signature:

HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

AMRUTBHAI JIVRAMBHAI PATEL

Appearance:

1. Criminal Appeal No. 162 of 1986

PUBLIC PROSECUTOR for Petitioner No. 1

MR CR ABICHANDANI for Respondent No. 1

MR SC VAKHARIA for Respondent No. 1

MR MINESH V SURTI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 04/09/2003

ORAL JUDGEMENT

This appeal is directed against the judgment and

order dated 03.09.1985 passed by the learned J.M.F.C. Dhandhuka Ahmedabad (Rural) in Criminal case no. 1/85 by which the present accused-respondent came to be acquitted under Sec. 409 and 477 of the Indian Penal Code (as such it can be said to be appeal against conviction as the respondent-accused has been sentenced to suffer R.I. for six months and fine of Rs.500/- and i/d non payment of fine the respondent-accused has to undergo R.I. for one month. However, under Sec. 4(3) of the Probation of Offenders Act, 1958, the respondent-accused was ordered to be released on probation for one year, on the accused furnishing a bail of Rs.1,000/- and surety of like amount. Accordingly the sentence mentioned above was suspended).

The brief facts of the present case are as under:

The complainant Babubhai Surjibhai Ninama was serving as Assistant Taluka Development Officer Dhandhuka district Ahmedabad Rural gave complaint before the P.S.I. of Dholera police station that while respondent-accused was working as Talati-cum-mantri at Sangasar village he recovered the land revenue and other local funds and played mischief with the carbon copy of money receipt and the respondent-accused deposited less amount in the Government treasury. According to the complainant, it becomes the duty of the Talati-cum-mantri in whose jurisdiction the area falls to enter the amount recovered towards land revenue and other local funds. In pursuance of the application given by one Gatorbhai N Dabhi dated 9.9.81 and on the investigation of complaint dated 29.9.81 and statement of talati-cum-mantri dated 7.11.81 given by the present respondent-accused A.J.Patel, it was found that while administering the accounts, the Government amount as well as the panchayat amount were misappropriated. Thereupon, the complainant Babubhai Ninama gave complaint dated 12.02.1984 against the present respondent-accused for the misappropriation of amount on the following line.

On 13.4.81 vide challan no. 1 to 115 the amount of Rs.1509.86 ps. was deposited in the Government treasury on 30.04.1981 vide challan no. 3. Vide challan no. 49 dated 1.3.81 the amount appears to have been recovered is Rs.170.03 ps. but while comparing with rojmel the figure was Rs.270.03 ps. It seems that instead of "2" figure "1" was written. By doing so, it appears that amount of Rs.100/- was deposited less. There appears no discrepancy in deposit of Rs.48.07 ps. vide challan no. 24 to 29 dated 13.04.1981, however, as per the statement given by Gatorbhai Nathabhai before the

Taluka Development Officer on 29.09.1981 the receipt of Rs.332/was produced which was not considered for the purpose of financial purpose as the signature on it was not legible.

On such complaint being given by the complainant, the police filed chargesheet vide exh. 1. But before the prosecution proceeded with the case, the advocate for the appellant gave application exh. 6 for referring this case to the Probation Officer. An order was passed by the Court on that application and report was called for from the Probation Officer and the report is produced at exh. 5 on the record of this case. Thereafter, the accused admitted his guilt vide pursis exh. 10. The charge was framed against the accused vide exh. 8 and statement of the accused was recorded vide exh. 9 whereby also the accused admitted his guilt. Accordingly the trial court accepted the report of the Probation Officer at exh. 5 and passed the conviction and suspended the said order under the Probation of Offenders Act, 1958 as stated above. Dissatisfied with the said order, the State Government has filed this appeal before this court.

Mr.B.D.Desai learned A.P.P. for the State has submitted that under Sec. 409, if the guilt is proved against the accused, then punishment prescribed under the said section is imprisonment for life which may extend for 10 years and also liable to fine. Under Sec. 477 of the I.P.C., punishment prescribed is for imprisonment for life which may extend to 7 years and also liable to fine. Section 409 of I.P.C. is classified as cognizable and non-bailable triable by the Judicial Magistrate First Class and Sec. 477 of I.P.C. is classified as non-bailable and cognizable and triable by J.M.F.C. Relying on Sec. 6 of the Probation of Offenders Act, 1958, Mr.Desai learned A.P.P. submitted that Sec. 409 and 477 of the I.P.C. are such offences for which no court shall ask for the report of Probation Officer in respect of any accused unless such accused is under 21 years of age. Therefore, in submissions of learned A.P.P. for the State, order of acquittal (as such conviction) is bad in law and requires to be set aside and proper sentence be awarded to the respondent-accused.

In support of his submissions, learned A.P.P. relied on the following authorities :

1. Som Nath Puri V/s State of Rajasthan reported in AIR 1972 S.C.1490.
2. Dalbir Singh V/s State of Haryana reported in

2000 Cr.L.R.(SC)447.

3. Vishwa Nath V/s State of J & K reported in AIR 1983 S.C. 174.

I have considered the arguments advanced by the learned A.P.P. for the appellant-State and also gone through the authorities cited by him.

Against the aforesaid submissions, learned advocate for the respondent-accused Mr.C.R.Abichandani has drawn my attention to the appeal memo filed by the present appellant-State wherein on 8th line of page no. 2 as well as 2nd line of para 2, the State has mentioned that they have filed this appeal against acquittal order passed by the learned J.M.F.C. Dhandhuka in Criminal case no. 1/85 dated 3.9.85. It is mentioned in the cause title that "Appeal against the order granted probation in favour of the respondent-accused in Criminal case no. 1 of 1985 on 3.9.1985." In grounds B and C it is mentioned as the learned Judge has erred in granting probation in favour of the respondent-accused by not appreciating the Probation of Offenders Act and various authorities of Apex court. The State has mentioned as appeal against acquittal order but it can be presumed that State has filed the appeal against the probation granted in favour of the respondent-accused in suspending the conviction and sentence order passed by the learned trial court Magistrate. Hence, I do not find any reason to appreciate the ground given by the learned advocate for the respondent-accused.

Further it was argued by Mr.Abichandani learned advocate for the respondent-accused that as per Sec. 11(2) of the Probation of Offenders Act, 1958 the appeal shall lie to the Court to which appeals ordinarily lie from the sentence of the former Court. I am in agreement with this argument of Mr.Abichandani. Sec. 11(2) of the Probation of Offenders Act, 1958 says "Notwithstanding anything contained in the Code, where an order under Sec. 3 or Sec. 4 is made by any Court trying the offender (other than a High Court), an appeal shall lie to the Court to which appeals ordinarily lie from the sentence of the former Court. Therefore, I am of the opinion that the appeal should have been filed before the next superior court in the hierarchy.

Mr.Abichandani learned advocate for the respondent-accused relied on the judgment of Apex Court in case of State of Gujarat V/s V.A.Chauhan reported in AIR 1983 S.C. 359 and submitted that though the Division Bench of the Hon'ble Apex Court is of the opinion that

Sec. 409,467 and 471 of I.P.C. and Sec. 5(1)(c) of Prevention of Corruption Act cannot be subject matter of Probation of Offenders Act, the Apex Court did not interfere as the benefit was already given to accused since many years and the appeal was accordingly dismissed.

Reverting back to the facts of the present case, Mr.Abichandani learned advocate for the respondent-accused stated that this is case wherein also against the conviction order passed on 3.09.1985 and today almost 18 years have passed and therefore this court should not interfere with the order passed by the learned trial court in view of the findings of the Apex court as referred above. I am of the opinion that this is a fit case wherein benefit should go to the respondent-accused.

Lastly, learned advocate for the respondent-accused has also relied on the decision in case of Surender Kumar Garg V/s State of Uttar Pradesh reported in 1993 Cri.L.J.2085 and submitted that the amount misappropriated was meagre amount and said amount was deposited by the respondent-accused in the Government treasury. Almost 18 years have passed and therefore whatever the sentence awarded be reduced to sentence undergone.

Against the aforesaid submissions, if we peruse the authority of Vishwa Nath (supra), it appears that the Division Bench of the Apex Court it has mentioned in para six as such that "He committed criminal breach of trust with respect to this money over which he had complete dominion by putting the same to his use. The refund of the amount after detection does not absolve him of the offence." Therefore, on this ground I am not in agreement with the learned Advocate for the respondent-accused.

In view of the aforesaid circumstances, I am of the opinion that on the following two grounds the appeal deserves to be dismissed. (1) That the appeal shall lie before the next senior court in hierarchy and (2) after lapse of 18 years the benefit should go to the respondent-accused.

Accordingly this appeal filed by the State is meritless and is dismissed.

(SHARAD D DAVE, J)

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